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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 315

ANTHONY DEANGELIS,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

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No. _____

ANTHONY DEANGELIS,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Anthony DeAngelis, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on June 6, 1966.

Opinion Below

The opinion of the court below (*infra* Appendix A, pp. 1a to 6a) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Statement of Questions Involved

1. Where the court made concurrent commitments for study and report and where the appellant commenced service of sentence, did the court lack the power to make commitments consecutive on re-sentence?

2. Whether the District Court had jurisdiction on re-sentence to make a commitment commence to run ten years after date of original commitment under Title 18, U. S. Code Section 4208?

Constitutional Provision Involved

The Fifth Amendment of the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statement of the Case

The Grand Jury in the district of New Jersey in December, 1963 returned an 18 count Indictment (Cr. No. 452-63)

against the defendant, Anthony DeAngelis. Subsequently, on March 11, 1964, the Grand Jury returned a 19 count Indictment (Cr. No. 105-64) charging Anthony DeAngelis along with four co-defendants with violations of Title 18 U.S.C. Section 2314, the interstate transportation of forged warehouse receipts and a violation of Title 18 U.S.C., Section 371, a conspiracy to commit offenses against the United States (4a to 15a). The 18 counts in the first Indictment were in effect superseded by counts 2 through 19 of the second Indictment.

On January 8, 1965, the defendant DeAngelis, appeared before the Honorable Reynier J. Wortendyke, Jr. and pleaded guilty to counts 2, 14 and 15 of Indictment No. 105-64. In addition, DeAngelis waived indictment and entered a plea of guilty to a criminal information (Cr. No. 4-65) charging a conspiracy between DeAngelis and Allied Crude Vegetable Oil Refining Corporation (15a to 18a).

On May 28, 1965, DeAngelis appeared before the Honorable Reynier J. Wortendyke, Jr. for sentence and at that time, after hearing counsel for the defendant and hearing from the defendant, the Court invoked the provisions of Title 18, U.S.C., Section 4208 (b) and (c) in the following manner:

> ". . . In order to evoke, or appropriately utilize the provisions of the statute which I previously read to you, Section 4208 (b) it is necessary that I impose a penalty on each of the counts to which you have pleaded guilty, consisting of the maximum sentence of imprisonment provided by the statute upon which the particular count or counts or the indictment or information were based.

"Therefore, in accordance with the provision of Section 4208(b) of Title 18, it is the sentence of this Court that you be committed to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law—and I have read you those maximum sentences—for a study as described in subsection (c) thereof, which I have read to you. In due time, within the period prescribed by the statute or enlarged under the limitation by the Court, you will be brought before me for further consideration at which time I will have the benefit of a complete report on you, together with the recommendations of the Director of the Bureau of Prisons. Those recommendations are not binding, but I sincerely and earnestly hope that they will be helpful to me.

"Such is the deposition of the penalty is your case.

"I might say that this commitment for study is to be considered concurrent—as you were, is to be considered for ten years under Section 2314 and five years under Section 371 to run concurrently, the latter to run concurrent with the former." (34a)

Thereafter, the Court signed and filed a Judgment and Commitment for Indictment No. 105-64 (35a) and for Information No. 4-65 (37a to 38).

On August 17, 1965, the defendant was returned before Judge Wortendyke, who imposed the following sentence. On Count 2 of Indictment No. 105-65 defendant was committed to the custody of the Attorney General for a period of ten years imprisonment (40a). On Information No. 4-65, he was committed to the custody of the Attorney

General for five years imprisonment to run concurrently with the sentence under Count 2 as above (40a). On Counts 14 and 15 of Indictment No. 105-64, the sentence was ten years imprisonment on each Count to run concurrently with each other, but to be consecutive to the sentence under Count 2 (40a to 41a). The practical effect of the sentence was imprisonment for a period of twenty years, just double the initial sentence. The defendant appealed to the Court of Appeals for the Third Circuit for relief from that part of the sentence under Indictment 105-64 which made the sentences under Counts 14 and 15 consecutive to the sentence under Count 2. The Court of Appeals affirmed the judgment of the District Court.

Reasons for Granting Writ

The question presented by this case represents such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In essence it involves the standards of fairness acknowledged as the responsibility of all parties to a federal criminal proceeding.

I

The Court exceeded its powers in the increase of the sentence imposed upon the defendant after commitment for study.

On May 28, 1965, the Court in imposing sentence on Anthony DeAngelis invoked the provisions of Title 18 U.S.C., Section 4208 (b) and (c). Pertinent parts of that section read as follows:

> "Sec. 4208 (b). If the court desires more detailed information as a basis for determining the sentence

to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion; (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.

"(c) Upon commitment of a prisoner sentenced to imprisonment under the provisions of subsection (a), the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall furnish to the board of parole a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to date regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The board of parole may make such other investigation as it may deem necessary.

> "It shall be the duty of the various probation officers and government bureaus and agencies to furnish to the board of parole information concerning the prisoner, and whenever not incompatible with the public interest, their views and recommendations with respect to the parole disposition of his case."

It will be noted that Section (b) provides that the commitment "shall be deemed to be for the maximum sentence of imprisonment prescribed by law". In addition, the same Section provides that after receiving the report the Court may "(1) place the prisoner on probation . . . (2) affirm the sentence originally imposed or reduce the sentence of imprisonment . . .."

The intent and purpose of this Section is to permit the Court to impose its maximum sentence and thereafter, after considering the report and study, to reduce the sentence in the event the Court feels such action is justified. *Corey* v. *U. S.*, 375 U. S. 169 (1963); *Dolack* v. *U. S.*, 217 F. Supp. 617 (D. C. Hawaii 1963).

The position of the petitioner is that the sentence imposed on August 17, 1965 is invalid for the reasons that, (1) the court exceeded its authority under the provisions of Section 4208 of Title 18 by increasing a sentence previously imposed and (2) the court had no power once it committed the petitioner to custody under Section 4208 on each count, to make the term sentence on any count commence on a date other than the date of original commitment.

Before dealing specifically with the points above, it might be well to consider the general law which the petitioner deems to be pertinent. The petitioner appeared for sentencing convicted by his plea of guilty to three Counts

charging violations of Title 18 U.S.C., Section 2314, which section reads in pertinent part as follows:

> "Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities . . . knowing the same to have been falsely made, forged, altered, or counterfeited; or . . .
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

In addition, the defendant was convicted by his plea of guilty to one Count contained in a Criminal Information charging him with a violation of Title 18, U.S.C., Section 371,which Section reads os follows:

> "Section 371. *Conspiracy to commit offense or to defraud United States.* If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

On May 28, 1965, the maximum sentence which the Court could have imposed was ten years imprisonment on each of the three Counts of the Indictment, and five years on

the Count in the Information. Had the Court chosen to do so, said sentences could have been made to run consecutively, thereby subjecting the defendant to thirty-five years imprisonment. It is generally held that unless otherwise provided by Statute a defendant who pleads guilty or is convicted under an Indictment charging two or more distinct offenses may be punished for both or all. *Blockburger* v. *U. S.*, 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). It is also generally held that in the absence of a Statute to the contrary in imposing sentence on two or more Counts or on two or more Indictments if the Court fails to specify otherwise the term of imprisonment on the second or subsequent judgment runs concurrently with the first. 21 Am. Jur. 2d 523.

With reference to the immediate effect of the imposition of sentence, Title 18 U.S.C., Section 3568 provides as follows:

> "Section 3568. Effective date of sentence; credit for time in custody prior to the imposition of sentence.
>
> "The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: Provided, That the Attorney General shall give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence.
>
> "If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his

sentence shall commence to run from the date on which he is received at such jail or other place of detention.

"No sentence shall prescribe any other method of computing the term."

It has been held that the Court has inherent power to impose consecutive sentences despite the aforementioned Section providing that sentence should run from the date that the prisoner is received for service of sentence. *Hill* v. *U. S.*, 306 F. 2d 245 (9th Cir. 1962); *Bledsoe* v. *Johnson*, 154 F. 2d 458 (9th Cir. 1946), cert. den. 328 U. S. 875. However, any doubt in the meaning of the sentence imposed concerning the method in which it is to be served raises a presumption that sentences are to be served concurrently with other sentences imposed at the same time. *Hode* v. *Sanford*, 101 F. 2d 290 (5th Cir. 1939).

A. The Court lacked the power on resentencing to make sentences run consecutively after having provided that said sentences would be concurrent.

The defendant, Anthony DeAngelis, was brought before the court for sentence on May 28, 1965. On that date the court saw fit to commit the defendant under the terms of Section 4208 of Title 18 U. S. Code. The defendant was committed to the custody of the Attorney General on that date and commenced service of his sentence immediately (see 18 U.S.C., §3568). On August 17, 1965, the defendant was returned before the court for resentence under the terms and provisions of the same Section 4208.

Under usual circumstances of sentence the court has only 60 days after sentence to reduce or otherwise modify a sentence. See Rule 35, Federal Rules of Criminal Procedure.

The aforementioned Rule has been construed to govern the right of the District Court to correct an illegal sentence or to reduce a valid sentence. The Court may not take any action to reduce or modify a valid sentence except within the period of 60 days prescribed therein. *Killgore* v. *Blackwell,* 332 F. 2d 585, 587 (3rd Cir. 1964). The court was therefore in a position when DeAngelis was brought back on August 17, 1965 where its powers were limited strictly to those designated in Title 18 U.S.C., Section 4208. The court could "place the prisoner on probation . . ." or the court could "affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law."

It is important therefore to consider certain aspects of the original sentence which the court imposed on May 28, 1965. On that date the effect of the court's sentence was "deemed" to be 10 years imprisonment for each violation of Title 18 U. S. Code, Section 2314, and to 5 years imprisonment for the violation of Title 18, U. S. Code, Section 371. Each of the aforementioned terms being the maximum prescribed by statute for the offenses involved. The court then clearly and unequivocally made each of the commitments concurrent and not consecutive in the following language:

> "I might say that this commitment for study is to be considered concurrent . . . as you were, is to be considered for 10 years under Section 2314 and 5 years under Section 371 to run concurrent, the latter to run concurrent with the former." (34a)

It may be well to consider the practical effect of the court's action on May 28, 1965 where it is related to the provisions of Title 18, U.S.C., Section 4208, the court im-

posed a sentence on each of the charges to which the petitioner had pleaded guilty. The court made it clear that it was imposing the sentence on each count, both in the oral statement made at the time of sentence and in the judgment which was subsequently filed (34a; 35a). The provisions of 4208 make a commitment thereunder the equivalent of a sentence for the maximum term possible under the criminal statute involved so that the court may have leeway later to reduce or modify the sentence. There is no provision under 4208 for multiple commitments under that section. There is no provision for consecutive commitments under 4208 where there are several violations charged, for presumably one study and one report on the defendant would be ample to assist the court.

The most important question therefore is whether the provisions of Title 18 U. S. Code, Section 4208 require a commitment on each Count under which sentence is to be imposed, or whether a commitment on one Count would be sufficient with the sentence on the remaining Counts left not imposed until the date of final sentence. The answer to that question would appear to be that there is nothing which would require the Court to proceed in the manner in which it did in the case herein.

It is therefore submitted that any action by the court in making several commitments with reference to the same defendant under the provisions of 4208 concurrent rather than consecutive, would serve to express the intent of the sentencing court to place a limitation upon the period of time for which the defendant could be imprisoned and yet impose the maximum penalty consistent with the provisions of Section 4208. A careful reading of the language of Judge Wortendyke at the time of the sentence of May 28, 1965 reveals a clearly manifested intention to commit on each count to which the defendant had pleaded guilty

and to make each commitment concurrent and not consecutice. The written judgments filed with the clerk subsequent to the oral pronouncement of sentence affirm the position that the sentences were concurrent.

It may be argued that because of the method followed in pronouncing sentence that some confusion as to the true meaning resulted. It has been generally held that where it is impossible to determine from the record whether sentences were to run concurrently or consecutively, then they must be construed as concurrent under the principle that serious uncertainty in criminal sentences must be resolved in favor of liberty. *U. S.* v. *Daugherty,* 269 U. S. 360, 46 S. Ct. 156, 70 L. Ed. 309 (1925); *Downey* v. *U. S.,* 91 F. 2d 223, 230 (D. C. Cir. 1937).

When the petitioner DeAngelis left the courtroom on May 28, 1965 he was fully justified in the assumption that the maximum sentence had been imposed upon him concurrently and that upon resentence the court could affirm that sentence, thereby committing him to the service of a sentence of 10 years imprisonment, which sentence commenced on the date of May 28, 1965, or the court could have in some manner under provisions of Section 4208, modified that sentence. What the court did on August 17 was to disregard the sentence of May 28 upon which the defendant had commenced service and imposed an entirely new sentence. This the court does not have the power to do. The court may not increase or make more severe the valid portion of a sentence originally imposed, where service of the sentence has commenced. *Kennedy* v. *U. S.,* 330 F. 2d 26, 27 (9th Cir. 1964).

Obviously, the purpose of the Statute 18 U.S.C. 4208 was to accomplish two things: (1) to give the sentencing Judge a better opportunity to determine whether or not there should be any change in his original sentence; and (2) to

also provide the defendant with the benefit of any latter judgment which the sentencing court may have in his favor. That the latter is so, is evidenced by the fact that the Statute does not give the court the right to in any way increase the original sentence imposed.

The word "deemed" in the Statute is most significant. It will be noted that the Statute does not say that the sentence imposed at the time of the original commitment shall be the maximum sentence provided under the law, but rather it says that it shall be "deemed" to be the maximum sentence. This, to us, makes it very clear that what the Statute intended was that whatever sentence the Judge then imposed was to be considered and, in fact, was to be the maximum sentence. Thus the provision that on the re-sentence, only one of three things could take place and none of them would be to increase that sentence. Consequently, when in the instant case the sentence was increased by doubling it, that, of course, constitutes an exercise of power beyond that which is granted and authorized in the Statute.

Certainly, the Statute was never intended to be used as an instrument of torture against the defendant, but if it can be so utilized as it was in this case to first impose a sentence which by the terms of the Statute itself, must be "deemed" to be the maximum sentence which the court intends to impose and then, three months later after the court has had the benefit of a report, the details of which are not revealed to the defendant and of which he knows nothing beyond the fact that the court has received it, a greater sentence can be imposed, then the Statute has become the instrumentality of oppression. Certainly, it can never be contended that this was the intent of the Congress or the purpose of the legislation.

The Court of Appeals in its opinion stated:

> "After the judge had completed the disposition of the penalty for study purposes and prior to the above final sentencing he made this comment:
>
> > 'I might say that this commitment for study is to be considered concurrent—as you were, is to be considered for ten years under Section 2314 and five years under Section 371 to run concurrently, the latter to run concurrent with the former.'
>
> "It is argued very carefully and most competently on behalf of appellant that this language would lead to the belief that the court imposed sentences aggregating in fact ten years. However, whatever the wishful interpretation which might be suggest as flowing from the offhand remark, the latter was definitely surplusage, made after the preliminary statutory sentence had been imposed and in no way decisional." (Appendix A, pp. 5a to 6a)

It is difficult to see how such a pronouncement by the court could be interpreted as surplusage when in the normal sentence procedure the court as a matter of course pronounces the term sentence in full and then after sentence is imposed, pronounces the limitations upon it. It is common practice for the trial court to impose a term sentence and then to suspend the operation of such sentence in connection with a term of probation or where there are multiple convictions the practice is to impose sentence on each count and then thereafter to indicate whether such terms are to be served concurrently or consecutively.

B. Where a commitment is made under Title 18 U. S. Code, Section 4208, any term of imprisonment imposed thereafter on resentence must run from the date of original commitment.

As has been discussed heretofore in this point, the power of the sentencing court on August 17, 1965 was limited to such power as conferred by the terms of Title 18, U. S. Code, Section 4208. That Section provides in part that:

> "The term of sentence shall run from date of original commitment under this Section."

The plain meaning of these words just cited leaves no room for interpretation other than that the sentences imposed on August 17, 1964 on each Count wherein the defendant had been previously committed under the terms of 4208 (b) must commence to run on the date of such prior commitment. Therefore, since the Court was proceeding under the aforesaid Section, he had had jurisdiction only to impose such sentence as would begin to run on May 28, 1965. The Court was without power to order that the service of the sentences under any of the Counts to which the defendant had pleaded guilty be consecutive to any sentences upon which the defendant commenced service on May 28, 1965.

CONCLUSION

The Petitioner was deprived of his liberty without due process of law in violation of the Constitution of the United States. The Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court

(Filed—June 6, 1966)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15632

UNITED STATES OF AMERICA,

v.

ANTHONY DEANGELIS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued May 17, 1966

Before STALEY, *Chief Judge,* and MCLAUGHLIN and SMITH, *Circuit Judges*

PER CURIAM.

The only question before us is what were the effective sentences imposed upon defendant-appellant. Whatever confusion there may have been regarding this, and it is more apparent than real, is best clarified by stating the sentencing process.

Appendix A

The defendant pleaded guilty to counts 2, 14 and 15 of a 19 count indictment. Those counts charged defendant with three separate offenses under 18 U.S.C. §2314, transportation of a forged warehouse receipt in interstate commerce. Each of those offenses had a maximum penalty of ten years imprisonment. Defendant also pleaded guilty to count 1 of an information against him for conspiracy to violate the provisions of 18 U.S.C. §2314. This had a maximum penalty of five years.

The defendant was before the court for sentence on May 28, 1965. The trial judge explained to him the statutory process whereby the court would be enabled to obtain further necessary information regarding him prior to imposing final sentence. The court said:

> "The Congress of the United States has provided for sentencing Federal Judges a means of invoking for their assistance further information, the results of further study, so that when the sentencing Judge is called upon to impose his final sentence he can feel in his conscience that he has left no stone unturned in his efforts to understand the individual."

The court then quoted the pertinent law:

> "Section 4208, subdivision (b) of Title 18 of the Criminal Code of the United States makes this provision:
>
> 'If the Court desires more detailed information as a basis for determining the sentence to be imposed, the Court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law for a study as described in subsection (c) hereof.' "

Appendix A

The court then pronounced the necessary sentence for study purposes under the above statute:

> "In order to evoke, or appropriately utilize the you, Section 4208(b) it is necessary that I impose a provisions of the statute which I previously read to penalty on each of the counts to which you have pleaded guilty, consisting of the maximum sentence of imprisonment provided by the statute upon which the particular count or counts of the indictment or information were based.
>
> "Therefore, in accordance with the provision of Section 4208(b) of Title 18, it is the sentence of this Court that you be committed to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law—and I have read you those maximum sentences—for a study as described in subsection (c) thereof, which I have read to you. In due time, within the period prescribed by the statute or enlarged under the limitation by the Court, you will be brought before me for further consideration, at which time I will have the benefit of a complete report on you, together with the recommendations of the Director of the Bureau of Prisons. Those recommendations are not binding, but I sincerely and earnestly hope that they will be helpful to me.
>
> "Such is the disposition of the penalty in your case."

Study judgments were entered in due course on both the substantive counts and the conspiracy count.

Appendix A

On August 17, 1965, after the conclusion of the statutory study of the defendant, the latter was finally sentenced by the judge who said:

> "I shall take up the counts to which the respective pleas of guilty were addressed in the following order, and impose sentence in that order: With respect to Count No. 2 in indictment criminal No. 105-65, it is the sentence of this Court that upon your plea of guilty to that count you be committed to the custody of the Attorney General of the United States for a period of ten years.
>
> "With respect to Count 1 of the information, Criminal No. 4-65, it is the sentence of this Court that you be committed to the custody of the Attorney General of the United States for a period of five years to run concurrently with the commitment under Count 2 of the indictment.
>
> "With respect to Count 14 of indictment No. 105-64, upon your plea of guilty to Count 14 of that indictment, it is the sentence of this Court that you be committed to the custody of the Attorney General of the United States for a period of ten years to run consecutively to the ten-year sentence imposed upon you under Count 2 of the same indictment.
>
> "Upon Count 15 of indictment Criminal No. 105-64, to which you pleaded guilty, it is the sentence of this Court that you be committed to the custody of the Attorney General of the United States for a period of 10 years to run concurrently with the ten-year sentence imposed upon you under Count 14 of the same indictment. The sentence under Count 2 of the indictment and the concurrent sentence under

> Count 1 of the information shall be deemed to have commenced, or rather, service thereof shall be deemed to have commenced with your commitment for study to the custody of the Attorney General pursuant to 18 U.S.C. Section 4208(b).
>
> "In sum, therefore, the aggregate of sentences imposed upon the information and upon the counts of the indictment to which guilty pleas were received aggregate twenty (20) years. That is made up of the concurrent period of ten and five years upon the second count of the indictment and the first count of the information, plus the concurrent terms of ten years on the fourteenth and fifteenth counts of the indictment."

Final judgment and commitment in accordance with the above was entered August 18, 1963.

The above outlined procedure was in precise compliance with the controlling statute. After the judge had completed the disposition of the penalty for study purposes and prior to the above final sentencing he made this comment:

> "I might say that this commitment for study is to be considered concurrent—as you were, is to be considered for ten years under Section 2314 and five years under Section 371 to run concurrently, the latter to run concurrent was the former."

It is argued very carefully and most competently on behalf of appellant this this language would lead to the belief that the court imposed sentences aggregating in fact ten years. However, whatever the wishful interpretation

which might be suggested as flowing from that offhand remark, the latter was definitely surplusage, made after the preliminary statutory sentence had been imposed and in no way decision. The judge, himself, on the occasion of the final sentencing when the language was called to his attention on the motion of appellant's attorney, made its intent when spoken entirely plain. He said, "It is true that I made a reference to the concurrence of a sentence for conspiracy with a sentence for the subsequent offense under one of the counts. However, I have considered the report and I have considered the statute. Your present application for reconsideration and modification of the statute is denied."

From our independent examination of this record we are satisfied that the trial court meticulously complied with 18 U.S.C. §4208 throughout the sentencing of the defendant and that the aggregate of the sentences validly imposed totals twenty years.

The judgment of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 315

ANTHONY DE ANGELIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1966. The petition for a writ of certiorari was filed on July 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was properly sentenced under the provisions of 18 U.S.C. 4208.

STATUTE INVOLVED

Section 4208(b) of Title 18 provides:

> If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.

STATEMENT

Petitioner and others were indicted in the District of New Jersey for the interstate transportation of

falsely made and forged securities in the form of warehouse receipts representing soy bean oil valued at millions of dollars, in violation of 18 U.S.C. 2314 (19 counts) (Cr. No. 105-64; R. 4a-15a [1]). Later an information was filed charging a conspiracy between petitioner and Allied Crude Vegetable Oil Refining Corp. to violate 18 U.S.C. 2314 (Cr. No. 4-65; R. 15a-18a), and petitioner waived indictment (R. 3a). Petitioner was represented by counsel at all pertinent times. On January 8, 1965, petitioner pleaded guilty to counts 2, 14 and 15 of the indictment (R. 1a) and to the information (R. 3a). At a sentencing hearing on May 28, 1965, the district judge, desiring "more detailed information as a basis for determining the sentence to be imposed," decided to employ the procedures available under 18 U.S.C. 4208(b) which provide for the preparation of a complete study of the prisoner by the Director of the Bureau of Prisons. The judge said (R. 34a):

> Therefore, in accordance with the provision of Section 4208(b) of Title 18, it is the sentence of this Court that you be committed to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law * * *.
>
> Such is the disposition of the penalty in your case.

The judge then added (R. 34a):

> I might say that this commitment for study is to be considered concurrent—as you were, is to

[1] References are to the appendix to appellant's brief in the court below filed as part of the record in this Court.

be considered for ten years under Section 2314 and five years under Section 371 to run concurrently, the latter to run concurrent with the former.

The formal judgment on the indictment counts under 2314 provided for imprisonment "pursuant to 18 U.S.C. 4208(b) for a study . . ." (R. 35a). The formal judgment on the conspiracy information provided (R. 37a): "This sentence to run concurrent with sentence imposed in Criminal 105-64" (the indictment).

On August 17, 1965, after the completion of the study called for under Section 4208(b), petitioner again appeared for sentencing (R. 39a). The court sentenced petitioner to imprisonment for ten years on Count 2 of the indictment; to five years' imprisonment on the information to run concurrently with Count 2; to ten years' imprisonment on Count 14 of the indictment to run consecutively to the sentence imposed on Count 2, and to ten years' imprisonment on Count 15 of the indictment to run concurrently with the sentence imposed upon Count 14, or an aggregate of twenty years' imprisonment (R. 40a-41a). Counsel for petitioner complained that he understood that the court had originally sentenced petitioner to only "ten years and five years to run concurrently" and moved the court to reduce the aggregate sentence to 10 years (R. 41a-42a). The district judge replied (R. 43a) that Section 4208(b) provides automatically that commitment "[s]hall be deemed to be for the maximum sentence of imprisonment prescribed by law" and that originally the court had "made a reference to the concurrence of a sentence for conspiracy

with a 'sentence for the [substantive] offense." The application for reconsideration and modification of the sentence was denied (R. 42a-43a).

ARGUMENT

Petitioners' contention that the preliminary sentence imposed by the district judge on May 28, 1965, was limited to ten years is based entirely on one ambiguous phrase in the court's eight-page statement. Taken in its entirety, the statement (R. 29a-34a) makes plain that the court intended, pursuant to 18 U.S.C. 4208(b), to "commit the defendant to the custody of the Attorney General" and that such commitment "be deemed to be for the maximum sentence of imprisonment prescribed by law". The court stated (R. 34a):

> In order to evoke, or appropriately utilize the provisions of the statute * * * Section 4208(b) it is necessary that I impose a penalty on each of the counts to which you have pleaded guilty, consisting of the maximum sentence of imprisonment provided by the statute upon which the particular count or counts of the indictment or information were based.
>
> Therefore, in accordance with the provision of Section 4208(b) of Title 18, it is the sentence of this Court that you be committed to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law * * *.

Having thus sentenced petitioner to the maximum sentence on each count, the judge added that the ten

year term under Section 2314 and the five year term under Section 371 were to run concurrently (R. 34a). In so saying, the judge failed to restate that there were three counts under Section 2314 on which petitioner was to be sentenced. From this, petitioner concludes that the judge intended the three ten-year terms under Section 2314 to run concurrently. But the judge's words do not require that conclusion. On the contrary, they refer only to the concurrence of the sentence on the information with the sentence on the indictment and make no reference to the several counts within the indictment. Moreover, the written Judgment and Commitment on the indictment (R. 35a), following form 25 of the Federal Rules of Criminal Procedure, provides "that the defendant is hereby committed * * * for imprisonment for a period of pursuant to 18 U.S.C. 4208(b)"—*i.e.*, "for the maximum sentence of imprisonment prescribed by law" as provided in Section 4208(b). The judgment on the indictment thus says nothing about concurrent terms under the indictment and should reasonably be understood, consistent with the purposes of Section 4208(b), to impose the maximum sentence leaving the judge free to impose any sentence less than the maximum after receiving the study called for. The Judgment and Commitment on the information (R. 37a-38a), on the other hand, provided "that the defendant is hereby committed * * * for imprisonment pursuant to 18 U.S.C. 4208(b) * * *. This sentence to run concurrent with sentence imposed in Criminal 105-64." It seems quite evident, therefore, that the only concurrence of terms intended by the

district judge was between that imposed on the indictment and that imposed on the information, and that in each case the commitment imposed, pending receipt of a report from the Director of the Bureau of Prisons, was to be "deemed to be for the maximum sentence of imprisonment prescribed by law" in accordance with Section 4208(b).

The Court has recently stressed (*United States* v. *Behrens*, 375 U.S. 162, 165) that the preliminary sentencing under Section 4208(b) is a purely tentative, formal matter designed solely to afford an opportunity to obtain a study which will serve as the basis for final sentencing. The Court said in *Behrens* (*ibid.*):

> * * * The use of § 4208(b) *postpones* action as to the final sentence; by using that section the court decides to await studies and reports of a defendant's background, mental and physical health, etc., to assist the judge in making up his mind as to what the final sentence shall be. It is only then that the judge's final words are spoken and that the defendant's punishment is fixed. * * * [Emphasis in original.]

The function of the original sentencing under Section 4208(b) is thus merely to preserve the status quo by the automatic but temporary imposition of the maximum sentence. Thus in *Corey* v. *United States*, 375 U.S. 169, the Court noted that the defendant, upon conviction on a 75 count indictment, was preliminarily deemed to be committed for a term of 375 years (375 U.S. at 171, n.3). In this regard, Section 4208(b) does not appear to vest the trial judge with any

discretion to impose a lesser sentence than the maximum which is deemed to be imposed. And certainly "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner" (*Bozza* v. *United States*, 330 U.S. 160, 166-167). Even if petitioner reasonably misinterpreted the district judge's comments at the hearing on May 28, 1965, no prejudice resulted. The sentence finally imposed on the indictment, following the completion of the study under Section 4208(b), was less than the maximum prescribed by law, and the sentence imposed on the information was made to run concurrently. Petitioner had not lost his right to appeal (*Corey* v. *United States*, *supra*). Under these circumstances, there is no occasion here for further review of the sentence.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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